IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Case No. : Crl. Misc. No.35240-M of 2005
Date of Decision : February 21, 2007.

Dilawar Singh ..... Petitioner

Vs.

Pankaj Joshi & another ..... Respondents

Coram : Hon'ble Mr.Justice Mahesh Grover

* * *

Present : Mr.Harsh Aggarwal, Advocate
for the petitioner.

None for respondent no.1.

Mr.Ashutosh Hoshiarpuri, AAG, Punjab
for respondent no.2-State.

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MAHESH GROVER, J. :

This is a petition under Section 482 of the Cr.P.C. praying for quashing of the order dated 26.05.2003 (Annexure P-6) and order dated 19.05.2005 (Annexure P-8), passed by the learned trial court (Sub Divisional Judicial Magistrate, Balachaur).

The facts of the case are that the petitioner had paid an amount of Rs.5 lacs to respondent no.1 on the strength of the representation made by the said respondent that he would send the petitioner abroad. The respondent no.1 failed to fulfill his obligation and when the petitioner demanded his amount back, he issued a cheque of Rs.5 lacs bearing No.445358 dated 31.7.1999 drawn on Oriental Bank of Commerce, Manimajra. On presentation, the said cheque was dishonoured and returned with a remark “Insufficient Funds”. The petitioner served a legal notice and

thereafter filed a complaint in the year 2000 under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as `the Act'). The respondent was thereafter ordered to be summoned for 9.2.2001 vide orders dated 16.12.2000 after preliminary evidence was recorded.

The respondent continued to evade the process of service and repeated process was issued by the Court for effecting the service upon him. Even bailable warrants were issued but the presence of the respondent could not be secured. The petitioner thereafter made an attempt to serve the respondent through publication which was allowed and the notice was published in the `Dainik Tribune'. Bailable warrants were again issued.

The trial court then came to the conclusion that it was not possible to secure the presence of respondent through ordinary process and ordered the proclamation under Section 82 of the Cr.P.C. by passing an order to that effect on 26.07.2002. Subsequently, the matter was adjourned a number of times. Pursuant to the aforesaid proceedings under Section 82 of the Cr.P.C., the relevant orders are as below :-

> *"Present : Complainant with counsel.*
>
> *Proclamation u/s 82 Cr.P.C. received back unexecuted. As per earlier order, proclamation be again issued for 25.9.2002.*
>
> *Sd/- SDJM/21.8.2002*
>
> *Present : Complainant with counsel.*
>
> *Proclamation received back unexecuted. Ahlmad is directed to issue reminder for 12.10.2002.*
>
> *Sd/- SDJM/25.9.2002*

Present : Sh.Lalit Chowdhary, Cl. for the complainant .

Statement of Sh. Harkewal Ram, HC No.202, P.S.Balachaur, has been recorded with regard to execution of proclamation u/o 82 Cr.P.C. As per the report of the head constable proclamation was effected on 11.10.02 vide his report Ex.P1. Notice to SHO P.S. Balachaur, be issued with direction to produce the Roznamcha before the court on 24.10.02.

Sd/- SDJM/12.10.2002

Present : Sh.Lalit Chowdhary, Cl. for the complainant .

Head Constable Gurchain Singh is present and he has produced the Roznamcha of 11.10.02. He has been directed to further direct HC-Harkewal on 25.10.02 for proceeding further.

Sd/- SDJM/24.10.2002

Present : Sh.Lalit Chowdhary, Cl. for the complainant .

HC Harkewal Singh is present and I have gone through the Roznamcha dt.11.10.02. HC Harkewal Singh has not made any entries in the Rupat Roznamcha. I warn HC

Harkewal Singh to be careful in future and I order to issue fresh proclamation u/s 82 Cr.P.C. for procuring the presence of accused Pankaj Joshi. Proclamation be issued for 2.12.2002.

Sd/- SDJM/25.10.2002

Present : Sh.Lalit Chowdhary, Cl. for the complainant .

File put up before me as Ld. Presiding Officer is on leave. Proclamation affected. To come upon 20.12.2002 for statement of executing official.

Sd/- SDJM/2.12.2002

Present : Sh. Lalit Chowdhary, Adv. for the complainant .

Case adjourned to 14.2.2003 for recording the statement of executing official. Executing Official be summoned for 14.2.2003.

Sd/- SDJM/16.11.2002

Present : Complainant with counsel.

HC Harkewal Singh be summoned for 16.1.2003 for recording his statement.

Sd/- SDJM/20.12.2002

Present : Sh.Lalit Chowdhary, Cl. for the complainant .

Notice sent in the name of HC Harkewal Singh received back unserved. He again be summoned for 28.2.2003.

Sd/- SDJM/14.2.2003

Present : Sh.Lalit Chowdhary, Cl. for the complainant .

Notice not issued by the Ahlmad as directed. He is warned to be careful in future. As per earlier order notice be issued for 20.3.2003.

Sd/- SDJM/28.2.2003

Present : Counsel for complainant .

File put up before me as Ld. Presiding Officer is on leave. As per earlier order, Ahlmad is directed to issue notice for 24.4.03.

Sd/- SDJM/20.3.2003."

The matter was again adjourned on 24.04.2003 to 26.05.2003 for recording the statement of HC Harkewal Singh.

On 26.05.2003, the complaint was dismissed in default as the complainant was not present. The order is reproduced as below :-

"Present : None.

Complaint called several times

during the day. None appeared. As such, the complaint stands dismissed in default for want of prosecution. File be consigned to the record room."

The petitioner was not in the knowledge of the aforesaid fact and was laboring under the impression that the respondent has already been declared as a Proclaimed Offender. He thereafter went abroad and appointed his wife Amarjit Kaur as his general attorney to prosecute the complaint.

On returning back, he came to know that the respondent had been arrested by the police in a case registered vide FIR No.173 dated 1.5.2005 under the provisions of Sections 420, 406, 467, 468, 471 and 120-B IPC. The petitioner, accordingly, moved an application before the trial court for issuance of production warrants of the accused and gave the particulars of his arrest and also the fact that he was in police custody with Police Station Udyog Vihar, Gurgaon. The trial court dismissed the said application on 19.5.2005 as after the perusal of the record, it was revealed that the complaint had already been dismissed on 26.5.2003.

By way of the present petition, the petitioner has assailed the order dated 26.5.2003 (Annexure P-6) and the order dated 19.5.2005 (Annexure P-8).

It was contended by the learned counsel for the petitioner that the petitioner was laboring under the impression that the respondent had been declared the Proclaimed Offender and the moment he came to know about his whereabouts, he moved an application for production warrants of the respondent and it is only then that he came to know that his complaint had been dismissed. Even on that date i.e. 26.5.2003, when the complaint had been dismissed in default, his presence as such before the court, was not essential as the proceedings were going on pursuant to Section 82 of the Cr.P.C. for declaring the respondent as a Proclaimed Offender.

The trial court, according to the learned counsel for the petitioner, was wrong in dismissing the complaint in default and even if the same had been done erroneously, the High Court, under Section 482 of the Cr.P.C., was empowered to restore the complaint back to its original status. Reliance was placed on a judgment reported as ***2004 (3) RCR (Criminal) 952*** and also on a judgment reported as ***2006 (4) RCR (Criminal) 678***.

I have heard learned counsel for the petitioner. No one has put in appearance on behalf of respondent no.1.

Concededly, respondent no.1 had not been served and the matter was pending before the court pursuant to the proceedings initiated by it under Section 82 of the Cr.P.C. The record also reveals that neither the complainant nor the respondent was present. A perusal of the orders of the trial court shows that the proceedings were being adjourned repeatedly to secure the presence of the respondent. In the process, the explanation given by the petitioner that he was laboring under the impression that the respondent had been declared as a Proclaimed Offender, thereby prompting his absence, cannot be entirely ruled out. In any case, his presence on the date when the complaint was dismissed, was not essential for the purpose of prosecuting the complaint.

Section 256 of the Cr.P.C. deals with the situation where the complainant fails to appear which is as follows :-

> ***"256. Non-appearance or death of complainant -*** ***(1)*** *If the summons has been issued on complaint and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused unless for some reason he thinks it proper to adjourn the hearing*

of the case to some other day :

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) *The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."*

The trial court had the option to acquit the accused or adjourn the matter to some other date if for some reason it thought it proper to do so.

The proviso to the aforesaid section stipulates that where the complainant is represented by a pleader or by any other officer conducting the prosecution or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

It is, thus, not the case that the Magistrate was left with no option but to dismiss the case in default in view of the non-presence of the complainant or his pleader. It was incumbent upon him to examine the case in the light of the aforesaid provisions of law and come to the conclusion whether the presence of the complainant was essential on that date of hearing or whether the hearing of the case could be adjourned for some other date or whether the personal attendance of the complainant was necessary.

No such application of mind is reflected from a perusal of the impugned order (Annexure P-6). The Hon'ble Supreme Court, in a

judgment reported as ***1998 (1) RCR (Criminal) 309***, with reference to the aforesaid provisions of Section 256, has observed as follows :-

> ***"16.*** *Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice."*

The trial court, therefore, was clearly in error in resorting to the extreme step of dismissal of the complaint especially in view of the fact that the matter was pending primarily to secure the presence of the respondent and proceedings under Section 82 of the Cr.P.C. were contemplated against him. As such, in the given facts and circumstances of the case, it was incumbent upon the trial court to have explored the possibility of either adjourning the hearing of the case to some other date or to have concluded whether the presence of the complainant was necessary so as to take such a serious view of his absence which resulted in the passing of the impugned order vide which the life of the complaint was extinguished.

For the reasons recorded above, the impugned order (Annexure P-6) is set aside and the matter is remanded back to the Court of Sub Divisional Judicial Magistrate, Balachaur who shall dispose of the complaint in accordance with law.

In view of the fact that the complaint has been directed to be restored back to its original status, the order (Annexure P-8) is also set aside and the trial court is directed to re-examine the application moved by the petitioner for issuance of production warrants against the respondent.

The present petition is accordingly allowed and disposed of as aforesaid.

February 21, 2007 **(MAHESH GROVER)**
monika **JUDGE**